Bina Puri Sdn Bhd v EP Engineering Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–26 OF 2004
GOPAL SRI RAM, LOW HOP BING AND WAN ADNAN MUHAMAD JJCA
4 DECEMBER 2007

Arbitration — Agreement — Incorporation — Incorporation of arbitration clause — Whether agreement must be signed

Arbitration — Arbitration clause — Incorporation of arbitration clause — Whether arbitration clause in subcontract incorporated into settlement agreement

The appellant and the second respondent formed a joint venture. Their joint venture was awarded a contract for infrastructure works relating to the construction of a cargo complex. Subsequently, the second respondent wrote to the first respondent, on behalf of the joint venture, awarding the second respondent a subcontract for certain works relating to the cargo complex construction. The subcontract contained an arbitration clause referring disputes to arbitration. The letter of award however, was not signed by the appellant. Disputes later arose which became the subject of a litigation which was settled and the compromise recorded in a settlement agreement. The settlement agreement, inter alia, referred to the terms and conditions in the subcontract. The appellant was a party to the settlement agreement and signed it. Later, the first respondent relying on the arbitration clause in the subcontract, referred the dispute to arbitration. The appellant argued that it was not a party to the subcontract and was therefore not bound by the agreement to arbitrate. The appellant sought a declaration in the High Court to the effect that it was not bound to go to arbitration with the first respondent. The High Court however held that there was indeed an agreement to arbitrate between the appellant and the instant first respondent. The appellant thus appealed to the Court of Appeal. The issue for determination was whether the appellant was bound by the arbitration clause in the subcontract.

Held, dismissing the appeal with costs:

(1) Whereas it is settled law that an agreement to arbitrate must be in

writing, it is not the law that an agreement to arbitrate must be signed. Thus, it was not necessary for the first respondent, in order to succeed, for it to produce an agreement to arbitrate signed by the appellant (see paras 5–6); *Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 MLJ 545 followed.

(2) Whether a term or a clause in one contract has been incorporated in another depends on the facts and circumstances of each case. There may be express incorporation or incorporation by conduct. In the instant case, there had been a sufficient incorporation of the subcontract into the settlement agreement. The recital to the settlement agreement made express reference to the subcontract and the letter of award. The same recital acknowledged that the second respondent was acting on behalf of the joint venture comprising of itself and the appellant, when it entered into the subcontract with the first respondent. The arbitration clause in the subcontract by reason of its incorporation bound the appellant (see para 10).

(3) The appellant could not avoid the arbitration agreement, by arguing that the first respondent had to initially prove its case against the second respondent and then initiate proceedings to affix the appellant with vicarious responsibility, for the following reasons. Firstly, in the recital to the settlement agreement, the appellant had acknowledged that the subcontract was entered into by the second respondent on behalf of the joint venture to which the appellant was a party. Secondly, the appellant was liable through the application of the ordinary principles of agency on the facts and circumstances of the case. The appellant itself had conceded that it was a partner of the joint venture (see para 12).

[Bahasa Malaysia summary

Perayu dan responden kedua membentuk sebuah usahasama dan telah diberikan kontrak untuk kerja-kerja infrastruktur berkaitan dengan pembinaan kompleks kargo. Kemudian, responden kedua menulis surat kepada responden pertama, bagi pihak usahasama tersebut, memberikan responden pertama subkontrak kerja-kerja tertentu berkaitan dengan pembinaan kompleks kargo tersebut. Subkontrak tersebut mengandungi klausa timbangtara untuk merujuk pertikaian kepada timbangtara. Surat tersebut walau bagaimanapun, tidak ditandatangani oleh perayu. Pertikaian kemudiannya berbangkit yang menjadi perkara litigasi yang telah diselesaikan dan persetujuan direkodkan di dalam perjanjian penyelesaian. Perjanjian penyelesaian tersebut, antara lain, merujuk kepada terma-terma dan syarat-syarat di dalam subkontrak tersebut. Perayu merupakan pihak kepada perjanjian penyelesaian tersebut dan telah menandatanganinya. Kemudian, responden pertama dengan menyandar kepada klausa timbangtara di dalam

subkontrak tersebut, merujuk pertikaian tersebut kepada timbangtara. Perayu menghujah bahawa ia bukan pihak kepada subkontrak dan oleh itu tidak terikat dengan perjanjian untuk menimbangtara. Perayu memohon deklarasi di Mahkamah Tinggi supaya ia tidak terikat untuk menghadiri timbangtara dengan responden pertama. Mahkamah Tinggi walau bagaimanapun, memutuskan bahawa sememangnya terdapat perjanjian untuk menimbangtara di antara perayu dan responden pertama di sini. Perayu oleh itu, merayu ke Mahkamah Rayuan. Isu yang perlu diputuskan ialah sama ada perayu terikat dengan klausa timbangtara di dalam subkontrak tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Walaupun ia adalah undang-undang mantap bahawa sesuatu perjanjian untuk menimbangtara mesti bertulis, ia bukan undang-undang bahawa perjanjian untuk menimbangtara mesti ditandatangani. Oleh itu, tidak perlu untuk responden pertama, untuk berjaya, mengemukakan perjanjian untuk menimbangtara yang ditandatangai oleh perayu (lihat perenggan 5–6); *Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 MLJ 545 (diikut).

(2) Sama ada sesuatu terma atau klausa dalam sesebuah perjanjian telah digabungkan ke dalam yang satu lagi bergantung kepada fakta dan hal keadaan sesuatu kes. Boleh terdapat penggabungan secara terus atau melalui tindakan. Di dalam kes ini, terdapat penggabungan yang mencukupi subkontrak ke dalam perjanjian penyelesaian tersebut. Sebutan permulaan perjanjian penyelesaian merujuk secara terus kepada subkontrak dan kemudiannya surat pemberian award. Sebutan permulaan yang sama juga mengakui bahawa responden kedua bertindak bagi pihak usahasama yang terdiri daripada responden kedua dan perayu, apabila ia memasuki subkontrak tersebut dengan responden pertama. Klausa timbangtara di dalam subkontrak, atas alasan penggabungannya, mengikat responden (lihat perenggan 10).

(3) Perayu tidak boleh mengelak perjanjian timbangtara tersebut, dengan menghujah bahawa responden pertama pada mulanya perlu membuktikan kesnya terhadap responden kedua, dan kemudian memulakan prosiding untuk menambah, terhadap perayu, tanggungjawab vikarius atas alasan-alasan berikut. Pertama, di dalam sebutan permulaan kepada perjanjian penyelesaian, perayu telah mengakui bahawa subkontrak tersebut telah dimasuki oleh responden kedua bagi pihak usahasama yang mana perayu adalah salah satu pihak. Kedua, perayu bertanggungjawab melalui aplikasi prinsip-prinsip agensi yang biasa di atas fakta dan hal keadaan kes. Perayu sendiri telah mengakui bahawa ia adalah rakan kongsi usahasama tersebut (lihat perenggan 12).]

Notes

For a case on incorporation of arbitration clause, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1185.

For cases on incorporation of arbitration, see 1 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1138–1143.

Cases referred to

Bauer (M) Sdn Bhd v Daewoo Corp [1999] 4 MLJ 545 (folld)

Brian Pty Ltd v United Dominions Corp [1983] 1 NSWLR 490 (refd)

Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd (1974) 131 CLR 321 (folld)

Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474 (refd)

Legislation referred to

Arbitration Act 1952 s 2

Appeal from: Originating Summons No R1–24–18 of 2000 (High Court, Kuala Lumpur)

Philip Chai (Philip Chai & Co) for the appellant.
T Sudhar (Shook Lin & Bok) for the first respondent.
Saseedaran Achan (Achan & Co) for the second respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] Malaysia Airlines System Berhad wanted to build a cargo complex at Kuala Lumpur International Airport, Sepang. That complex needed infrastructure works. On 3 December 1996, Malaysia Airlines System Berhad awarded the contract for the infrastructure works to a joint venture constituted between the appellant and the second respondent in the instant appeal. On 29 January 1997, the second respondent in this appeal wrote to the first respondent. In that letter, it awarded the subcontract for certain works in respect of the cooling system for the cargo complex in question. The appellant did not sign the said letter of award; nor was it ever mentioned in that document. Later, disputes arose which became the subject matter of proceedings in court. The first respondent before us was plaintiff in those proceedings and the appellant and the second respondent among others were the defendants. That litigation was settled. The compromise was recorded in a settlement agreement dated 12 January 1999. Section 1.02 of the recitals to the settlement agreement reads as follows:

> By a letter of intent dated the 11th day of December, 1996 and a letter of award dated the 29th day of January, 1997 both attached hereto as Appendix 1 (hereinafter called the 'Letters'), KHEC acting on behalf of the JV, awarded a subcontract (hereinafter called the 'subcontract') to EP for the execution and completion of the Chilled Water Loop System (hereinafter called the 'Services'), which forms part of the Works awarded by MAS to the JV, based on the terms and conditions as stipulated in the Letters and in the Standard Form of Contract for subcontracts (hereinafter called the 'Sub-Contract Agreement') attached hereto as Appendix II.

[3] The appellant was a party to the settlement agreement. It signed it. Later, the dispute was referred to arbitration by the first respondent in this appeal. Reliance was placed on the arbitration clause in the articles of agreement accompanying the letter of award of the subcontract. The appellant took the point that it was not a party to the subcontract and therefore not bound by the agreement to arbitrate. The appellant then brought an action for a declaration that it was not bound to go to arbitration with the first respondent. The learned judge who heard the appellant's summons dismissed it. He held, on the material before him, that there was indeed an agreement to arbitrate between the appellant and the instant first respondent. The appellant being dissatisfied has appealed to this court.

[4] We would be doing no injustice to the submissions of learned counsel for the appellant if we said there was really only one issue in this appeal. That issue is whether the appellant is bound by the arbitration clause in the subcontract. It is common ground that there is no separate agreement to arbitrate between the appellant and the first respondent. So it is a question of construction having regard to the factual matrix against which this appeal rests whether the appellant is correct in its contention.

[5] Now it is settled law that an agreement to arbitrate must be in writing. Section 2 of the Arbitration Act 1952, the legislation under which this arbitration was proceeding, requires it. But it is not the law that an agreement to arbitrate must be signed. This court had to deal with the identical point in *Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 MLJ 545. This is what the court said in the course of the judgment in that case:

> … The phrase 'written agreement' in s 2 of the Act does not demand of a formal agreement executed by the parties to the dispute. The agreement to which the section refers may be gathered from either a single document or a series of documents or, in some cases, a party may be estopped from asserting that there is no agreement. This principle is amply covered by authority.

[6] It follows that in the present instance it is not necessary for the first respondent, in order to succeed, for it to produce an agreement to arbitrate

that is signed by the appellant before us. Suffice that there is such an agreement. In support of the learned judge's finding, learned counsel for the first respondent has placed reliance on the settlement agreement and in particular section 1.02 of the recitals which we have already reproduced earlier in this judgment. The submission is that the subcontract and the letter of award have been incorporated into the settlement agreement. Since the appellant is a party and a signatory to the settlement agreement, it is bound by the arbitration clause in the subcontract. The appellant however contends that there has been no incorporation in the present case.

[7] Once again, the point which lies at the axis of the dispute was dealt with in *Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 MLJ 545, where at p 556 it was held as follows:

> We were once again regaled with authorities where a term either was, or was not, held to have been incorporated into a contract by reference thereto in another document. Again, I must say that the cases cited by counsel amount to no more than illustrating the application of a well- established principle to particular fact patterns. Upon the principle there is no dispute. It was stated with clarity by Venkatarama Aiyar J, in *TN Rao v Balabhadra* 1954 AIR Mad 71 at p 72:
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> > When a contract in writing is signed by parties, they are bound by the terms contained therein whether they take the trouble of reading them or not. This principle has been extended to cases where the contract does not actually contain the terms but a reference is made to another document or contract where those terms are to be found. The reason for holding that those terms must be taken to have been incorporated by reference in their signed agreement is that it was possible for any of them to look into that document and ascertain the terms. An examination of the authorities in which this view has been adopted shows that they are either cases in which the other contract is one between the same parties and therefore the terms including the arbitration clause might be taken to have been within the knowledge of the parties; or cases in which there is a reference to a specific document which was in existence and whose terms could easily be ascertained if the parties wanted to. It is reasonable to hold that when the parties had referred to a document which was in existence they had knowledge or what comes to the same thing, could have had knowledge, of all the terms contained in that document and an arbitration clause contained in that document must, therefore, be held to be binding on them exactly as if it had been incorporated in extenso in the signed contract. The foundation of this reasoning is the existence of another specific document containing an arbitration clause. It is essential that the terms of an agreement must be precise and definite. This applies as much to an arbitration agreement as to other agreements. Before holding that the parties have agreed in writing to refer their dispute to arbitration and in the absence of such a clause in the agreement actually signed by the parties there must at least be a specific contract or document containing such a clause in respect of which it might be said that it had been incorporated in the agreement of the parties by reference.

In *The Annefield* [1971] P 168, Brandon J, (later Lord Brandon of Oakbrook), found the relevant authorities as establishing four propositions. He summarised them as follows (at p 173F–H of the report):

> First, in order to decide whether a clause under a bill of lading incorporates an arbitration clause in a charterparty it is necessary to look at both the precise words in the bill of lading alleged to do the incorporating, and also the precise terms of the arbitration clause in the charterparty alleged to be incorporated.
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> Secondly, it is not necessary, in order to effect incorporation, that the incorporating clause should refer expressly to the arbitration clause. General words may suffice, depending on the terms of the latter clause. Thirdly, when the arbitration clause is, by its terms, applicable only to disputes under the charterparty, general words will not incorporate it into the bill of lading so as to make it applicable to disputes under the contract contained in, or evidenced by, that document. Fourthly, where the arbitration clause by its terms applies both to disputes under the charterparty and to disputes under the bill of lading, general words of incorporation will bring the clause into the bill of lading so as to make it applicable to disputes under that document.

Similarly, in *The Abu Road Electricity & Industries Co Ltd v Industrial Gases Ltd* 1977 AIR Cal 482 at p 488, Datta J, after a review of the authorities which included the decision in *The Annefield*, said:

> On a review of the above cases the following principles regarding the incorporation of the provisions of one agreement into another agreement appear to have been laid down.
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> (a) a clause in an earlier contract can be imported into a subsequent contract if the language is appropriate unambiguous and clear.
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> (b) such clause in the earlier contract can be written in bodily into the later contract if there is no inconsistency or vagueness or uncertainty.
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> (c) a clause in the earlier contract which is germane to the subject-matter of the later contract may be incorporated therein by general words though some degree of manipulation may be involved.
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> (d) in respect of a clause in the earlier agreement which is not directly germane to the subject-matter of the later agreement, it is not permissible to construe general words as incorporating such clause therein when the clause in terms does not relate to transactions of such later contract. Such clause can only be incorporated in the later contract by clear words either in the earlier or subsequent contract.

For my part, I would, with respect, enter a caveat in respect of what was said in *The Annefield* and *The Abu Road Electricity & Industries Co Ltd v Industrial Gases Ltd.* The four principles set out by the learned judges in these two cases are not to be treated as immutable rules carved upon a tablet of stone. They are but guidelines

A that assist a court when making a determination whether a term ought to be regarded as having been incorporated into a contract by reference to another document.

In my judgment, at the end of the day, whether an incorporation by reference was intended by the parties in a particular case is a question that must be resolved
B according to the peculiar facts of the individual case. The authorities appear to me to form a spectrum. At one end of that spectrum are cases where no difficulty has been experienced in holding that a term has been incorporated by reference to another document either because of the use of clear and unequivocal language or equally clear implication. *Temperley Steam Shipping Co v Smyth & Co* [1905] 2 KB
C 791 was such a case.

[8] In another passage in the same judgment, this court held the following:

But that a term may be incorporated not only by words but also by conduct is
D illustrated by *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, where it was proved that the hirer of a crane expected that the hire would be subject to certain conditions imposed by the supplier. There had been no course of dealings between the parties. Neither had the terms actually specified by the supplier been drawn to the attention of the hirer before the contract was
E concluded. Yet, it was held, upon the basis of a common understanding derived from the conduct of the parties, that the suppliers terms had been incorporated into the contract of hire by reference.

[9] The principle then to be distilled from the decided cases is this.
F Whether a term or a clause in one contract has been incorporated in another depends on the facts and circumstances of each case. There may be express incorporation or incorporation by conduct.

[10] On the facts and circumstances of the present instance we are in
G agreement with the learned judge that there had been a sufficient incorporation of the subcontract into the settlement agreement. Section 1.02 of the settlement agreement cannot be any clearer in its terms. It is also to be noted that the recital makes express reference to the subcontract and the letter of award. It is also to be noted that the same recital acknowledges that the
H second respondent was acting on behalf of the joint venture comprising of itself and the appellant when it entered into the subcontract with the first respondent. The arbitration clause in the subcontract by reason of its incorporation already referred to accordingly binds the appellant. That should really be an end to this appeal. But there is a further point taken by
I learned counsel for the appellant which we think we are obliged to deal with.

[11] It has been argued by learned counsel for the appellant that the first respondent's case in the arbitration is really directed in its entirety against the second respondent. On the totality of the material before us, it is said, the

appellant's responsibility is really one through the ordinary rules of attribution. In other words, what the first respondent is saying is that the appellant is liable not because it did anything wrong but because it is to be held responsible for the acts and omissions of the second respondent. It has been argued that on this basis the arbitration agreement against the appellant is futile because it is for the first respondent to initially prove its case against the second respondent and then to initiate separate legal proceedings to affix the instant appellant with vicarious responsibility for the acts and omissions of the second respondent. With respect we do not agree.

[12] In the first place there is the acknowledgment in section 1.02 of the recitals to the settlement agreement. In that recital you have an acknowledgment by the appellant that the subcontract was entered into by the second respondent on behalf of the joint venture to which the appellant was a party. In the second place, there is, we consider, a strong argument of liability through the application of the ordinary principles of agency on the facts and circumstances of this case. Indeed, there is a letter dated 15 May 1998 written by the instant appellant's then-solicitors to the instant first respondent's solicitors in which there is a concession that the instant appellant is a partner of the joint venture.

[13] In *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474, Jemuri Serjan CJ (Borneo) referred to the decision of the New South Wales Court of Appeal in *Brian Pty Ltd v United Dominions Corp* [1983] 1 NSWLR 490 where Hutley JA said this:

> Though joint venture agreements are common, particularly in the resource development field, there is little authority as to the responsibilities of the joint venturers, inter se. In *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321, what was described as a joint venture was held to be a partnership. That joint ventures have fiduciary relationships, inter se would seem to be essential for the efficacy of the device.

[14] If the court in *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 could on the facts before it conclude that the joint venture there was in essence a partnership there is in our judgment sufficient material on which a similar finding may be made in our case.

[15] For the reasons already given, this appeal cannot succeed. It is dismissed. The appellant must pay the costs of this appeal to the respondents. A word about costs. There has really been only one argument in this appeal from the respondents and it has come from the first respondent. We would therefore direct the taxing registrar to disallow any getting up on the second

respondent's bill of costs. However both respondents shall be entitled to out of profit costs and out of pocket expenses. All the orders of the High Court are affirmed and the deposit shall be paid out to the first respondent on account of taxed costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon